

STATE OF MICHIGAN
COURT OF APPEALS

LINDA SKRINE and JOSEPH SKRINE,

Plaintiffs-Appellants,

v

MICHAEL L. VANDERBEEK, D.D.S., JOHN
KILLINGER, D.D.S., GLEN J. MARSACK,
D.D.S., NANCY MARSACK, KILLINGER &
VANDERBEEK P.L.L.C., and MARSACK
PROPERTIES L.L.C.,

Defendants-Appellees.

UNPUBLISHED

August 31, 2010

No. 290469

Oakland Circuit Court

LC No. 2007-086418-NO

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal as of right from the trial court's order granting summary disposition to all defendants. We affirm.

On October 13, 2004, plaintiff¹ tripped and fell when she left defendants' dental office in Waterford Township. Plaintiff commenced a negligence action against defendants and alleged that she fell on "uneven" or "broken" pavement at the dental office's parking lot. During her deposition, plaintiff testified that she fell when she stepped onto a cement curb that crumbled. The trial court granted the Marsack defendants' motion for summary disposition under MCR 2.116(C)(10) after finding that there was no genuine issue of material fact regarding whether those defendants knew or should have known of any defect associated with the curb. The trial court granted the Killinger and Vanderbeek defendants' motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10) after finding that plaintiff failed to present any evidence to support that those defendants, as lessees of the property from the Marsack's, owed plaintiff a duty of care.

¹ Because Joseph Skrine's interest in this case is derivative of that of his wife, Linda Skrine, this opinion, for ease of reference, will use the singular word "plaintiff."

Plaintiff first contends that the trial court erred in finding that there was no genuine issue of material fact regarding whether “defendants” had notice of the defective curb. As noted, the trial court only granted the Marsack defendants’ motion for summary disposition on this basis. The Killinger and Vanderbeek defendants were granted summary disposition on other grounds (concerning duty of care). However, because plaintiff does not distinguish between the classes of defendants in this portion of her argument, and because the existence of a duty of care in this case is dependent on knowledge of a dangerous condition, we will determine if there was a genuine issue of material fact regarding whether any defendant knew or should have known of the dangerous condition of the curb, sidewalk, or parking area.

This Court reviews de novo a trial court’s decision to grant summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). A moving party is entitled to summary disposition under MCR 2.116(C)(10) when, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” *Lugo v Ameritech Corp*, 464 Mich 512, 520; 629 NW2d 384 (2001), quoting MCR 2.116(C)(10). “A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ.” *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006).

The elements of a negligence claim are “(1) that defendant owed [plaintiffs] a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4) that defendant’s breach caused plaintiffs’ injuries.” *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). The duty an owner or occupier of land owes to a visitor is dependent on the status of that visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). One who enters another’s land on invitation for a commercial purpose is considered an invitee. See *id.* at 596-597, 605-606. In the instant case, plaintiff’s status as an invitee is not disputed. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if the possessor knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm. *Lugo*, 464 Mich at 529. An invitor can have either actual or constructive knowledge of a dangerous condition. See, e.g., *Clark v Kmart Corp*, 465 Mich 416, 419-421; 634 NW2d 347 (2001). “Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful [invitor] to discover it” *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979); see also *Clark*, 465 Mich at 419-421. After reviewing the record, we conclude that there was no genuine issue of material fact regarding whether any defendants involved in this case had knowledge of the defective curb sufficient to trigger their duty of care with respect to plaintiff.

Plaintiff acknowledged during her testimony that she had no evidence concerning defendants’ knowledge of the dangerous curb and had no evidence concerning how long the alleged defect existed before her fall. Plaintiff testified that she thought the parking lot and curb looked safe when she arrived for her dental appointment. She stated that the parking lot “looked fine” and that the parking lot and curb did not appear to be in a state of disrepair. She explained that the parking lot looked “beautiful” and had just been resurfaced and that she felt “very safe” to traverse the parking area into the office. Plaintiff agreed that the parking area looked smooth and intact and she did not notice any loose gravel near the curb. She stated that the photographic

exhibits depicted the area where she fell and it appeared “much worse” than the area appeared on the day of the accident. The photographs were not taken at the time of the accident, although plaintiff claims that some were taken “a few days” later. There was simply no evidence introduced that the defective curb was present for a prolonged period of time sufficient to establish that defendants had constructive knowledge of any defect. *Whitmore*, 89 Mich App at 8.

With respect to the affidavit plaintiff offered at the motion hearing, the expert based his opinion in part on the deposition photographs and plaintiff’s deposition testimony. The photographic exhibits were taken after the incident; the photographs do not appear to show any serious erosion or significant breakage in the concrete; and, according to plaintiff’s own testimony, the area appeared to be in worse shape in the photographs as compared to its condition on the day of the incident. Plaintiff testified that the pavement appeared safe and in good condition on the day of the accident, which contradicted the expert’s opinion. Moreover, the expert acknowledged that “[t]he type of defect involved was not easily observed by casual review.” Additionally, he asserted that there “should have been visual cracks” in the concrete, but this was conjecture, which cannot establish a genuine issue of material fact. See e.g. *McCune v Meijer, Inc*, 156 Mich App 561, 563; 402 NW2d 6 (1987).

We conclude that the trial court did not err in granting the Marsack defendants summary disposition because there was no genuine issue of material fact regarding whether any defendant involved in this case had notice of a dangerous condition associated with the curb or parking lot. The Killinger and Vanderbeek defendants were also entitled to summary disposition on this basis, although the trial court granted them summary disposition on another ground. Because the existence of a duty of care was dependent on knowledge of the dangerous condition in this case, there was no genuine issue of material fact regarding whether any defendant owed plaintiff a duty to protect against the dangerous curb or parking area. See *Kroll v Katz*, 374 Mich 364, 372; 132 NW2d 27 (1965) (notice of a defect is a question of fact not a question of law); *Clark*, 465 Mich at 419 (an invitor’s duty of care is dependent on notice of the dangerous condition). In light of our resolution, we need not address plaintiff’s argument that the trial court erred in its analysis concerning whether the Killinger and Vanderbeek defendants owed plaintiff a duty of care. See *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005) (“it is axiomatic that this Court will not reverse a trial court’s decision if the correct result is reached for the wrong reason”).

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering